

No. 85-1613

3

Supreme Court, U.S.

FILED

JUL 23 1986

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE INC. I, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI

FILED MARCH 31, 1986

CERTIORARI GRANTED MAY 27, 1986

51pp

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JOHN DOE INC. I, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT*

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

CIVIL DOCKET CONTINUATION SHEET

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
3/12/85	1704	IN RE: GRAND JURY INVESTIGATION: Fld Application for an Order to Sho[w] Cause and Protective Order . . . and Memo of Law in support of application.
3/12/85		IN RE: GRAND JURY INVESTIGATION: Fld. MEMO ENDORSED: Application for vacatur and protective relief denied without prejudice to their renewal before the trial judge expected to be assigned when case is filed on March 15, 1985. SO ORDERED: PALMIERI J. 3-12-85
3/13/85	1721	IN RE: GRAND JURY INVESTIGATION: Fld Notice of Appeal by John Does Inc. I, II, and III from the order of Judge Palmieri entered on March 12, 1985. Mailed copies.
3/13/85	1722	IN RE: U.S. DEPT OF JUSTICE—CIVIL DIVISION—* * *: Fld. TRANSCRIPT on RECORD of PROCEEDINGS. DATED, 3-12-85, BEFORE Judge C.L. Brieant, USDJ
3/13/85	1723	IN RE: U.S. DEPT. OF JUSTICE—* * *: FLD. TRANSCRIPT on RECORD of PROCEEDINGS, dated 3-12-85, before Judge CL Brieant, USDJ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET No. 85-6054

IN RE:

GRAND JURY INVESTIGATION

JOHN DOES, I, II, III, IV, V AND JOHN DOES, INC.,
I, II AND III,
APPELLANTS,

v.

UNITED STATES OF AMERICA,
APPELLEE.

RELEVANT DOCKET ENTRIES

	DATE	FILINGS—PROCEEDINGS
BFM	3-13-85	Movants JOHN DOE I, II & JOHN DOE INC I, Notice of Motion for Protective Order Pending Appeal, FILED.
BFM	3-13-85	Movants JOHN DOE I et al Notice of Motion for Expedited Appeal, FILED.
BFM	3-13-85	Movants DOE Memorandum of Law in Support of Motions filed 3-13-85, RECEIVED.
BFM	3-13-85	Copy of district court docket entries and Notice of Appeal on behalf of the Appellants JOHN DOES I, II, III, IV, V and JOHN DOES INC I, II & III, FILED.
BFM	3-14-85	Copy of receipt re: payment of the docketing fee in the district court, FILED.
BFM	3-14-85	Appellee USA Memorandum in Opposition to the Appellants[] Motion for protective order/expedited appeal, FILED.

	DATE	PROCEEDINGS
BFM	3-15-85	Order that the motion for a protective order prohibiting the United States from filing its complaint on March 15, 1985 be denied and further noting that the appeal from the November 30, 1984 order, pursuant to Fed. R. Crim. P.6(e), authorizing disclosure of grand jury materials to certain government attorneys, is expedited to the week of April 8, 1985; the Clerk[]s office shall enter an appropriate scheduling order and further ordering that the complaint be sealed upon its filing with the Clerk of the district court, and until such time as the appeal from the Rule 6(e) order is decided by this Court. No party now privy to the contents of the complaint, the identities of the parties named as defendants therein, or any information derived from the grand jury proceedings used in preparing the complaint, shall disclose such material in any manner whatsoever to any person not privy to such information. This prohibition shall remain in effect pending issuance of this Courts mandate in the appeal from the Rule 6(e) order, FILED. (By IRK, RJC, cjj, CHT, dj)
BFM	3-15-85	Certified copy of the order filed on 3-15-85 issued to the district court. (SDNY).
BFM	3-15-85	SDNY receipt of Order, filed on 3-15, RECEIVED.
BFM	3-15-85	Appellee USA Memorandum to the Court, FILED.

	DATE	PROCEEDINGS
BFM	3-19-85	Scheduling Order #1 (EXPEDITED) FILED.
GH	3-21-85	Form C on behalf of JOHN DOES and JOHN DOES INC filed, pfs
	3-21-85	Form D on behalf of JOHN DOES and JOHN DOES INC FILED
jc	3-22-85	Record on appeal filed (original papers of district court)
jc	3-26-85	Appellants brief filed w/ps*
jc	3-26-85	Appellants joint-appendix filed w/ps*
jed	4-3-85	Appellee USA motion for leave to file supplemental appendix & leave to file brief & supplemental appendix under seal filed
jed	4-3-85	Appellee brief and supplemental appendix received
jed	4-3-85	Appellant John Does I, II and John Does, Inc I affidavit in opposition & response to motion of appellee USA filed.
jed	4-3-85	Appellee reply to appellants' affidavit in opposition to motion for leave to file supplemental appendix & leave to file under seal (brief & supp appendix) filed
jed	4-3-85	Order granting appellee motion for leave to file supplemental appendix & leave to file brief & supplemental appendix under seal filed
jed	4-3-85	Appellee brief & supplemental appendix filed (sealed)
MJ	4-4-85	Appellants reply brief filed w/pfs.
KG	4-9-85	Case heard before: Kears, Pierce and Pratt, CJJ.

	DATE	PROCEEDINGS
jc	9-24-84	Judgment Reverse and Vacate the Rule 6(e) order, and grant the protective relief requested by the appellants, published signed opinion filed (GCP)
jc	9-24-85	Judgment filed
jc	10-8-85	Appellee (USA) motion for extension of time to file petition for rehearing filed w/ps
lmc	10-7-85	Appellants['] itemized & verified bill of cost received (w/pfs)
lmc	10-18-85	Order granting Appellee (USA) motion for 14 day extension of time to file petition for rehearing to <i>October 21, 1985</i> filed (endorsed on motion filed 10-8-85)
MJ	10-21-85	Appellee USA motion for extension of time to and through 10-31-85 to seek rehearing filed w/pfs.
MJ	10-31-85	Appellee USA petition for rehearing with suggestion for rehearing en banc <i>received</i> .
MJ	11-1-85	Order granted Appellee USA motion for extension of time to and through Oct. 31, 1985 to seek rehearing filed. (ALK, LWP, GCP)
MJ	11-1-85	Appellee USA petition for rehearing with suggestion for rehearing en banc filed w/pfs.
MJ	12-2-85	Order denied appellee USA petition for rehearing with suggestion for rehearing en banc filed. (E.B.G.)
jc	12-9-85	Appellants['] statement of costs filed
jc	12-12-85	Mandate Issued (opinion, judgment and statement of costs)

	DATE	PROCEEDINGS
MJ	4-7-86	Notice of filing of petition for writ of certiorari filed. (S.C. #85-1613)
mjf	5-27-86	Certified copy of order of the Supreme Court granting petition for writ of certiorari filed

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Misc. No. M 11-188

IN RE U.S. DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

**MOTION OF THE UNITED STATES FOR
AN ORDER UNDER RULE 6(e) OF THE
FEDERAL RULES OF CRIMINAL PROCEDURE**

The United States, through the Antitrust Division of the U.S. Department of Justice, respectfully requests the Court to issue an Order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure authorizing disclosure of grand jury material arising from the Grand Jury empanelled in this District on December 14, 1982 to:

Stuart E. Schiffer
Deputy Assistant Attorney General
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Michael F. Hertz, Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Robert L. Ashbaugh, Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Howard Sribnick, Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Rudolph W. Giuliani
 U.S. Attorney
 Southern District of New York
 Howard Wilson, Chief
 Civil Division
 U.S. Attorneys office
 Southern District of New York

or to any attorney of the Civil Division of the U.S. Department of Justice or the U.S. Attorneys Office for the Southern District of New York who may be designated by any of the afore-named attorneys to assist in the review of this matter. The Court shall be notified promptly of any such designation by means of a letter of disclosure to the Court.

In support of this Motion, the Government relies on the arguments made in the accompanying Statement of Points and Authorities and the affidavit of Anna Swerdel and further states as follows:

1. The contents of the material to be reviewed by the afore-named individuals may include "matters occurring before the grand jury." Fed. R. Crim. P. 6(e).
2. Authority to disclose is requested "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i).
3. There is particularized need for the disclosure.

Since this application discloses the existence and general nature of a grand jury investigation, we respectfully request that this application and order be sealed until further order of the Court.

Respectfully submitted,

CHARLES S. STARK,
Attorney
Department of Justice

/s/ ANNA SWERDEL

Anna Swerdel

CRAIG W. CONRATH,
Attorney
Department of Justice

/s/ CAROLYN G. MARK

Carolyn G. Mark
Attorneys
Antitrust Division
Department of Justice
Washington, D.C. 20530
(202) 633-2519

Date:

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Misc. No. M 11-188

IN RE U.S. DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF THE
MOTION OF THE UNITED STATES FOR
AN ORDER UNDER RULE 6(e) OF THE
FEDERAL RULES OF CRIMINAL PROCEDURE

The Antitrust Division of the U.S. Department of Justice has been investigating whether violations of the Sherman Act were committed by corporations and their employees or agents by illegally fixing prices and rigging bids with regard to sales of tallow to the Government of Egypt in transactions financed by the United States Agency for International Development. The grand jury empanelled in this district on December 14, 1982 heard testimony and received documents in this investigation. The grand jury's term expired on June 13, 1984.

On June 8, 1984 the Antitrust Division decided not to seek the return of indictments by the grand jury. The Sherman Act may be enforced by criminal or civil action. The staff attorneys responsible for conducting the grand jury investigation were instructed to continue the investigation as a civil matter. The Antitrust Division currently is considering whether to bring a civil action, based on the evidence obtained in the course of its grand jury investigation, alleging violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, Sections 3729-3731 of the False Claims Act, 31 U.S.C. §§ 3729-3731, and Section 640A of the Foreign Assistance Act of 1961, 22 U.S.C. § 2399b.

Although the Antitrust Division is authorized to prosecute conduct in violation of the False Claims Act that also violates the antitrust laws, the Civil Division of the U.S. Department of Justice is charged with the primary responsibility for enforcing the False Claims Act. 28 C.F.R. §§ 0.40(a), 0.45(d). To ensure uniform and fair enforcement of the False Claims Act, the Antitrust Division wishes to obtain the advice of the Civil Divisions of the U.S. Department of Justice and the U.S. Attorneys Office for the Southern District of New York regarding the merits of a False Claims Act case in this matter. In order to take full advantage of the expertise of these Divisions, the Antitrust Division proposes to disclose to these Divisions certain materials which describe the conduct at issue. The materials to be reviewed contain references to grand jury testimony and documents produced to the grand jury. Thus, the Divisions' review of the materials will involve the disclosure of matters that occurred before the grand jury. The Antitrust Division, therefore, seeks an Order from this Court under Federal Rule of Criminal Procedure 6(e)(3)(c)(i) to allow the disclosure of matters occurring before the grand jury to Stuart E. Schiffer, Deputy Assistant Attorney General, Commercial Litigation Branch, Civil Division, Michael F. Hertz, Director of the Commercial Litigation Branch, Civil Division, Robert L. Ashbaugh, Assistant Director of the Commercial Litigation Branch, Civil Division, Howard Sribnick, Trial Attorney, Commercial Litigation Branch, Civil Division, Rudolph W. Giuliani, U.S. Attorney, Southern District of New York, Howard Wilson, Chief, Civil Division, U.S. Attorneys Office, Southern District of New York, or to any attorney of the Civil Division of the U.S. Department of Justice or the U.S. Attorneys Office, Southern District of New York, who may be designated by any of the aforementioned attorneys to assist in the review of this matter.

A. The Information To Be Disclosed May Include Matters That Occurred Before The Grand Jury

The information to be disclosed includes a description and analysis of the evidence (both testimonial and documentary) uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury. Accordingly, the disclosure may include matters occurring before grand jury. *Index Fund, Inc. v. Hagopian*, 512 F. Supp. 1122 (S.D.N.Y. 1981). The issuance of a Rule 6(e) Order by this Court, therefore, may be necessary to prevent a violation of Fed. R. Crim. P. 6(e).

B. The Antitrust Investigation is Currently At The Stage Of Being "Preliminary To Or In Connection With A Judicial Proceeding"

Subsection (3)(c)(i) of Fed. R. Crim. P. 6(e) provides that "[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made when so directed by a court preliminary to or in connection with a judicial proceeding."

The Supreme Court in *United States v. Baggot*, ___ U.S. ___, 103 S. Ct. 3164 (1983), specifically left open the question whether an "investigation" undertaken by a government agency would always be preliminary to a judicial proceeding if the only recourse available to the agency once it uncovers a violation of law is to initiate litigation.¹ 103 S. Ct. at 3168. In addition, the Court explicitly declined to "address how firm an agency's decision to litigate must be before its investigation can be characterized as preliminary to a judicial proceeding." 103 S. Ct. at 3168 n.6. In so declining, however, the Court implied that an investigation, at some stage, may be con-

¹ Any enforcement action taken by the Division lies in the federal district courts. 15 U.S.C. § 4.

sidered "preliminary to or in connection with a judicial proceeding." *Id.* This investigation is at a stage where it properly can be viewed as preliminary to a judicial proceeding.

The staff attorneys have completed their investigation in the above-captioned matter. They have prepared memoranda recommending proposed enforcement actions for the Division to take. Swerdel Affidavit at ¶ 8. The Division must now decide whether or not to approve the staff attorneys' recommendation. The disclosure of information to attorneys in the Civil Divisions of the U.S. Department of Justice and the U.S. Attorneys Office for the Southern District of New York is necessary to enable them to participate in the Antitrust Division's decision-making process as to the appropriateness of a False Claims Act case, and is not for purposes of further investigation by these Divisions. An affirmative decision by the Antitrust Division to file a case will result in a judicial proceeding. Thus, any disclosure to attorneys in these Divisions is preliminary to a judicial proceeding under Rule 6(e)(3)(c)(i).

C. There Is A Sufficient Showing Of Particularized Need For This Court To Allow Disclosure Of Information By The United States

The Supreme Court in *United States v. Sells Engineering, Inc.*, ___ U.S. ___, 103 S. Ct. 3133 (1983) reiterated that Fed. R. Crim. P. 6(e) requires a showing of particularized need for grand jury materials before any disclosure will be permitted. 103 S. Ct. at 3148. Citing *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), the Court stated that parties seeking disclosure must show that "the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only materials so needed." *Id.* at 3148.

a. The need for disclosure outweighs the need for secrecy

The need for disclosure in this situation is greater than the need for continued secrecy. *Douglas Oil, supra*, identified four reasons for secrecy: the protection of witnesses from retribution by those against whom they testify, the prevention of improper influence of grand jurors by the subjects under investigation, the preclusion of the possibility that those about to be indicted may flee, and the protection of those who may be accused, but later exonerated, from public ridicule. 441 U.S. at 219. These concerns are not relevant here where the disclosure is to be made to attorneys of the U.S. Department of Justice and the U.S. Attorneys Office for the Southern District of New York who will not disclose further the information.

On the other hand, the reasons supporting disclosure are substantial. The disclosure of information is necessary to ensure the proper functioning of the decision-making process of the U.S. Department of Justice. In order properly to exercise its prosecutorial discretion, review of the memoranda by the Civil Divisions is necessary to ensure that the Department acts consistently in its enforcement efforts. The review is also important to ensure that prosecution of this matter would carry out Department policy regarding the False Claims Act. Moreover, without disclosure of this information, the Antitrust Division would not be able to take full advantage of the Civil Divisions' expertise in enforcing cases under the False Claims Act.

Coordination between the Civil Divisions and the Antitrust Division is necessary to ensure the fair and even-handed administration of justice. It would be more difficult for the Department to achieve consistency and uniformity in its enforcement efforts if its officials were unable to learn the facts of relevant matters being investigated by staff attorneys in other Divisions. This uniformity of enforcement is necessary not only to the

Department but to the public as well. Without uniform enforcement, the public would have difficulty rationally choosing courses of action which might be affected by the antitrust and the civil fraud laws.

b. There has been no abuse of the grand jury process

The Supreme Court in *Sells* also was concerned with the potential for prosecutorial abuse of the grand jury process. The Court feared that the broad scope of grand jury powers might be improperly used to obtain evidence for use in a civil suit. 103 S. Ct. at 3142-3143. The grand jury investigation in this matter was, at all times, conducted in good faith. At no time was the grand jury used to gather evidence for a civil case; its sole purpose was to determine whether there existed potential criminal liability on the part of the subjects of the investigation.

The antitrust laws may be enforced by criminal or civil action. At the beginning of an investigation, the Antitrust Division evaluates whether the conduct to be investigated is of the type that it normally prosecutes criminally. If so, it will authorize a grand jury investigation. Otherwise, the Antitrust Division will rely on the broad civil investigative powers afforded by the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314.² With these civil investigative powers available to the Antitrust Division, there is no reason for it to use a grand jury to gather evidence for a civil case.

² Under the Antitrust Civil Process Act the Division can issue Civil Investigative Demands which compel a witness or corporation:

- (1) to produce documents to the government;
 - (2) to give oral testimony under oath; and
 - (3) to respond, in writing, to written interrogatories.
- 15 U.S.C. § 1312(a), (g), (h), (i)(l).

The grand jury in this matter investigated and uncovered evidence of price fixing and bid rigging. The Antitrust Division routinely prosecutes such conduct criminally. Nevertheless, on June 8, 1984, the Antitrust Division, exercising its prosecutorial discretion and in light of the specific facts obtained in the course of the investigation, determined not to seek indictments but to proceed by civil action. Swerdel Affidavit at ¶¶ 5, 6. Therefore, at all times the grand jury investigation was conducted with the good faith belief that the activity being investigated was appropriate for criminal sanctions.

After the Antitrust Division decided to proceed by civil investigation on June 8, 1984, the staff attorneys conducted no further investigation using the powers of a grand jury. In accordance with Antitrust Division practice, the Assistant Attorney General for the Antitrust Division, J. Paul McGrath, invoked the Antitrust Division's civil investigative powers to continue its investigation. There has been no misuse of the grand jury.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that its Motion for an Order permitting disclosure of grand jury matters, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, be granted.

Respectfully submitted,

CHARLES S. STARK
Department of Justice

/s/ ANNA SWERDEL
Anna Swerdel

CRAIG W. CONRATH
Department of Justice

/s/ CAROLYN G. MARK
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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Misc. No. M 11-188

IN RE U.S. DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

AFFIDAVIT OF ANNA SWERDEL

Anna Swerdel, being first duly sworn, states that the following is true and correct:

1. I am an attorney employed by the Antitrust Division of the United States Department of Justice and am a member of the Bar of the District of Columbia. I make this affidavit in support of the Motion of the United States for Disclosure of Grand Jury Material under Rule 6(e) of the Federal Rules of Criminal Procedure.

2. Investigations of the Antitrust Division are conducted by staff attorneys assigned to various sections within the Antitrust Division. I am assigned to the Foreign Commerce Section of the Antitrust Division.

3. In March 1982, I received authority to conduct a grand jury investigation in the Southern District of New York into possible violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, one of the federal antitrust laws. I was the lead attorney assigned to this investigation. Specifically, the grand jury investigated the possibility of collusion with regard to sales of tallow to the Government of Egypt. These sales were made by suppliers of tallow in the United States and were funded by the Agency for International Development ("AID") of the U.S. Department of State.

4. Subpoenaed documents subsequently were transferred by Order of this Court to the Grand Jury empanelled in this district on December 14, 1982 ("the

December 14, 1982 Grand Jury"). The December 14, 1982 Grand Jury heard testimony and subpoenaed additional documents.

5. After review of the grand jury material, on June 8, 1984, the Antitrust Division decided not to seek any indictments. The term of the December 14, 1982 Grand Jury expired on June 13, 1984.

6. Concurrent with the decision not to seek any indictments, the staff attorneys were instructed to continue the investigation as a civil matter. We have done so.

7. Upon completion of an investigation, civil or criminal, the staff recommends possible prosecutorial actions to its supervisors. The staff has prepared its recommendation with regard to the investigation of AID-financed sales of tallow to Egypt.

8. The staff recommendations discuss, *inter alia*, the bringing of cases under the Sherman Act, 15 U.S.C. § 4, the Foreign Assistance Act, 22 U.S.C. § 2399b, and the False Claims Act, 31 U.S.C. §§ 3729-3731.

9. The Antitrust Division is authorized pursuant to 28 C.F.R. § 0.40(a) to recover forfeitures or damages for injuries sustained by the United States as a result of antitrust law violations, for example, under the False Claims Act. Nevertheless, the Civil Division of the U.S. Department of Justice has primary responsibility for and expertise in the enforcement of the False Claims Act. 28 C.F.R. § 0.45(d).

10. The Antitrust Division wants the advice of the Civil Divisions of the U.S. Department of Justice and the U.S. Attorneys Office for the Southern District of New York before proceeding with any action in this matter under the False Claims Act in order to maintain consistency in the enforcement effort and the exercise of prosecutorial discretion by the Department of Justice. Given its expertise in enforcing the False Claims Act, these Divisions are in a position to advise the Antitrust Division on the appropriateness of prosecuting this matter under the False Claims Act.

11. To the best of my knowledge and belief, and based upon due inquiry, none of the grand jury materials has been furnished, shown, or otherwise disclosed to any attorney of the Civil Divisions of the U.S. Department of Justice or the U.S. Attorneys Office for the Southern District of New York.

12. This affidavit is based upon personal knowledge, information, and belief.

/s/ ANNA SWERDEL

Anna Swerdel

Attorney

Antitrust Division

U.S. Department of Justice

District of Columbia

Subscribed and sworn to before me this 29th day of November, 1984.

/s/ [illegible]

Notary Public

My Commission Expires: March 14, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 11-188 CLB

IN RE UNITED STATES DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

March 12, 1985
2:00 p.m.

Before:

HON. CHARLES L. BRIEANT,

District Judge

APPEARANCES

RUDOLPH W. GIULIANI,
*United States Attorney for the
Southern District of New York,*

CRAIG W. CONRATH

ANNA SWERDEL

NANCY KILSON
Assistant United States Attorneys

PAUL R. GRAND

DIANE PARKER
Attorney for Witness

[2] THE COURT: Everybody in the room here officially.

MS. KILSON: Nancy Kilson. I am liaison counsel with the Department of Justice on this case.

THE COURT: You are an Assistant U.S. Attorney.

MS. KILSON: Yes, your Honor.

THE COURT: The capacity of Mr. Conrath and Ms. Swerdel?

MR. CONRATH: We are attorneys with the Antitrust Division in Washington.

THE COURT: While the court was waiting to convene I did have a chance to read the proposed papers and I have ascertained that there is a sealed court order dated November 30, 1984, and it seems to me the impression of Mr. Grand, who has never seen the order, that it was signed by Judge Palmieri of this court and if that is true then any collateral attack on that order would have to be heard by Judge Palmieri, because I am not established here to review his determinations.

However, I have not seen the order. I sent the clerk of the court to go look for it, which is like looking for needle in the haystack. So maybe Mr. Conrath or Miss Swerdel, maybe you will determine whether that's true, whether he is the author the order relied upon.

MR. CONRATH: That's correct.

[3] MR. GRAND: The issues we are raising is the footnote 15 Sells.

THE COURT: Be that as it may, if there's any relief to be obtained from that order, that must be obtained from Judge Palmieri.

THE COURT: The clerk is on the telephone now and wants to know who the assistant was on the matter so he can find the alleged order, unless you people have a copy with you.

MR. CONRATH: We do, your Honor.

THE COURT: Would you show me the order please, Mr. Conrath.

THE COURT: Have you people had a chance to see Mr. Grand's proposed papers?

MR. CONRATH: Yes, your Honor. We got them at 10:30 this morning.

THE COURT: Well, it seems to me that it would be appropriate that the contents of this order be revealed to counsel, unless there's a reason not to and, as I said

earlier, this proposed order to show cause here essentially is an attack upon or an application to modify that order it seems to me and, therefore, properly must be referred to Judge Palmieri for his consideration, unless he refuses to hear it.

MR. GRAND: Judge, I am sure you grasp this. In [4] addition to being that, it is also an application that I think probably has nothing to do with Judge Palmieri's order and that is to preclude the antitrust division from using grand jury material to prepare —

THE COURT: Is there any reason why counsel cannot see this order, because he is talking in the dark?

MR. CONRATH: We have no objection to removing the seal from that order.

THE COURT: Would you give him a copy of it? Kindly do so. The simple answer, Mr. Grand, is it appears to this court that the department is proceeding in all respects pursuant to an authorization by a judge of this court and that being so any relief from that order ought to be presented to Judge Palmieri.

MR. GRAND: Judge, this order, as I understand it, authorizes the antitrust division to confer with attorneys in the civil division or the U.S. Attorney's office. It does not authorize the antitrust division to use the grand jury material to prepare and file and litigate a civil lawsuit.

THE COURT: Would you kindly tell me whether it was your opinion that the court ordered those matters to be disclosed to persons known to be, by their very titles, in the commercial litigation branch of the civil division of the Department of Justice merely to titillate their [5] curiosity.

MR. GRAND: I think that the purpose of it, as I understand it from conferences I have had with the anti-trust division, it was to consult with them on whether or not a civil litigation should be begun and the order on its terms says that the information will be treated as confiden-

tial and its use will be limited solely for the purposes of this order. It does not authorize disclosure to the world, judge. It just doesn't.

THE COURT: I really must say with no disrespect that I couldn't disagree more. Here is a court which turns over grand jury minutes and exhibits to named persons by their titles and once that's done you are asking me to have the milk that's been spilled put back into the bottle and I can't do that.

I think I should deny all relief here with leave to apply to Judge Palmieri if you deem yourself so advised.

Do you understand the problem, Mr. Conrath? Is there any better suggestion you have?

MR. GRAND: If you think Judge Palmieri ought to be the person to decide this —

THE COURT: I think Judge Palmieri gave them these minutes for lawful use —

MR. GRAND: How can we know if we have not reviewed the application or the showing of what the [6] particularized need was. Sells makes it clear.

THE COURT: Is there any reason why the petition cannot be disclosed to counsel?

MR. CONRATH: No, your Honor.

THE COURT: I'm sorry.

MR. CONRATH: No, your Honor. There's no reason.

THE COURT: All right. This court orders that the original order and motion which resulted in the order of November 30, 1984, be unsealed when and if the clerk of court can find it and I urge you both to go down to the clerk's office and try to assist the clerk in finding it so it can be unsealed. Beyond that, I am unwilling to go. I will give you a memorandum endorsement.

MR. GRAND: Are you saying we should go to Judge Palmieri?

THE COURT: No. You should go down to the clerk's office and see if you can find the original. I am ordering it unsealed. After you have read, if you believe your rights are affected in some fashion, you may either apply to Judge Palmieri or I don't know what else you can do. The court has released this material to the civil division.

MR. GRAND: Neither the civil division nor these people are authorized by an order to commence a lawsuit, judge.

[7] THE COURT: They don't need authorization to commence a lawsuit. What they needed was authorization to look at these grand jury materials, upon a showing of specialized need, to get the information they need for whatever official duties they plan to discharge, including even the recommendation of new legislation to congress.

MR. GRAND: That may be, but that does not warrant wholesale disclosure beyond that in the form of the commencement of a civil lawsuit for all of the reasons set forth in Sells.

THE COURT: Do you have the motion with you?

MR. CONRATH: Yes.

(Pause)

MR. GRAND: May I address your Honor?

THE COURT: Certainly.

MR. GRAND: It seems to me both the application and the order dealt only with consultation.

THE COURT: I don't so read it.

MR. GRAND: That's all they were asking for. The issue that was reserved in the Sells case, i.e., whether or not the prosecutors before the grand jury can use the material to bring a civil case, was specifically reserved by the Supreme Court in Sells with the Supreme Court noting that there were numerous issues that should be considered and weighed in arriving at the decision it [8] arrived at or in the matter reserved.

THE COURT: One of us doesn't understand this, Mr. Grand and I really think it's you. May I say this to you: A civil division attorney for the government can get grand jury minutes and exhibits upon a showing of particularized need, from a judge, pursuant to 6(e) of the rules of criminal procedure.

MR. GRAND: That's correct, sir.

THE COURT: They went to a judge whose commission from the president is the same dimensions as my own. They made a showing in writing which his Honor Judge Palmieri thought to be a showing of particularized need. Judge Palmieri signed an order which is broad enough to let them spill the milk on the ground which they did and I don't see anything further that this court can do or should do about it and I have issued an order here which you can conform your copy telling exactly my view of the matter.

You can either apply to Judge Palmieri, which seems to me to be of no help at this stage, because they already got it, or you can take an appeal from my order or you can wait until you get sued and move to dismiss the action on the ground of violation of rights under Sells.

Beyond that, there's nothing here to do. Would you read the court's order?

MR. GRAND: It seems to me the essential failure [9] of those application papers are to deal with the question of whether the Department of Justice made any other attempt to get the information which was readily available to them.

THE COURT: I do not sit here for purposes of revising the judicial determinations of another judge of equal rank.

MR. GRAND: I think then the answer is I have to go to Judge Palmieri.

THE COURT: That might well be true. Any decision made here is without prejudice to anything that you take up with Judge Palmieri. I think in fairness you should order the transcript and make that available to his Honor.

MR. GRAND: I will certainly do that.

THE COURT: I might say also I am not even reaching the question of whether these papers show a particularized need for disclosure because that's a finding he already made and I am not concerned with that finding. All right. Thank you very much.

**RESPONDENTS' PROPOSED ORDER TO SHOW CAUSE
AND PROTECTIVE ORDER**

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Misc. No. (Sealed)

IN RE GRAND JURY INVESTIGATION

**ORDER TO SHOW CAUSE AND PROTECTIVE ORDER
PURSUANT TO RULE 6(e), FED. R. CRIM.P.**

On the application of petitioners for an Order to Show Cause and Protective Order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure in the above-captioned action, the affidavit of Paul R. Grand and memorandum of law in support of the application, the Court is satisfied that petitioners have made a sufficient and proper showing in support of the temporary relief granted herein. It is, therefore, hereby

ORDERED that the Antitrust Division of the Department of Justice show cause, if any there be, to this Court at ____ m. on the ____ day of March, 1985, in Room ____ of the United States Courthouse, Foley Square, New York, New York, or as soon thereafter as counsel can be heard, why this Court should not enter a protective order pursuant to Rule 6(e), Fed.R.Crim.Pro.:

1. Prohibiting further disclosure of any testimony, exhibits, documents or other matters occurring before the grand jury in the tallow investigation, or the substance thereof, by the Antitrust Division to the Civil Division until final adjudication of the matters raised by this petition and any other such petitions as may be made in connection herewith before this Court and any other Court;

2. Prohibiting the use of grand jury material obtained in the tallow investigation in preparing, filing or litigating the civil action contemplated by the Antitrust Division

pending final adjudication of the matters raised by this petition and any other such petitions as may be made in connection herewith before this Court and any other court;

3. Sealing this application and all motion papers and pleadings filed in this Court arising out of the grand jury tallow investigation; and

4. Directing the Justice Department to serve on petitioners herein all papers and pleadings previously and hereinafter filed in this Court and any other Court in connection herewith. It is further

ORDERED that until the date set above by this Court:

1. Further disclosure of any testimony, exhibits, documents or other matters occurring before the grand jury in the tallow investigation, or the substance thereof by the Antitrust Division is prohibited;

2. The use of grand jury material obtained in the tallow investigation in preparing, filing or litigating the civil action contemplated by the Antitrust Division is prohibited;

3. This application and all motion papers and pleadings filed in this Court arising out of the grand jury tallow investigation are sealed; and

4. The Justice Department is directed to serve on petitioners herein all papers and pleadings previously or hereafter filed in this Court and any other Court in connection herewith. It is further

ORDERED that service of this Order and the plaintiff's application, along with all supporting documents, shall be effected upon the Antitrust Division on or before the ____ day of March 1985. Service may be made personally or by mail.

United States District Judge

Dated: March ____, 1985.

[ORDER OF JUDGE BRIEANT]

After hearing counsel this date I decline to sign the within order. See transcript of hearing this date. Movant appears to be seeking to attack collaterally in this proceeding an ex parte order by Judge Palmieri of this Court dated November 30, 1984 [.] No jurisdiction exists to do so. This determination is without prejudice to any application which movant may desire to make before Judge Palmieri.

SO ORDERED

/s/ CHARLES BRIEANT
U.S.D.J. (Part I)

New York, N.Y.
March 12, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 11-188 ELP

IN RE UNITED STATES DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

March 12, 1985
3:00 p.m.

Before:

HON. EMUND L. PALMIERI,

District Judge

APPEARANCES

RUDOLPH W. GIULIANI,
*United States Attorney for the
Southern District of New York,*

CRAIG W. CONRATH

ANNA SWERDEL

NANCY KILSON
Assistant United States Attorneys

PAUL R. GRAND

DIANE PARKER
Attorney for Witness

[2] (In chambers)

THE COURT: I am recognizing Mr. Grand, who is here to propose certain interim restraints on an order to show cause arising from the ex parte order which I signed under Rule 6[e] of the Federal Rules of Criminal Procedure on the affidavit of Miss Swerdel of the antitrust division of the Department of Justice sometime ago. What was the date of that order?

MS. SWERDEL: November 30, 1984.

THE COURT: Go ahead, Mr. Grand.

MR. GRAND: Let me begin with the aspect of the relief that I seek that I think has nothing to do with your order. You will no doubt recall that in a footnote in the Sells Engineering opinion the Supreme Court left open and did not decide whether or not the same attorneys who present a case to the grand jury shall be permitted to use the grand jury materials for the purpose of bringing a civil case. The court did not rule on that subject, left it open.

We believe the court did, in deciding the matter that it did decide, provide guidance for that future decision and, in particular, set out a standard of weighing various considerations, one of which has to do with whether or not the justice department has made any effort to obtain the materials that they intend to use in the civil case [3] through ordinary civil means.

We believe that the present case, which occupied a grand jury investigation for in excess of two years and resulted in no indictments, could also have been investigated civilly either concurrently with the grand jury investigation or indeed after the grand jury investigation.

However, we have reason to believe that at least 90 percent of the material on the basis of which the civil complaint is now to be filed, and I was just told that it will be filed on Friday, was grand jury material.

In other words, the civil case that we are now about to be greeted with is a product of the grand jury's investigation in virtually its entirety.

THE COURT: When you say will be filed, will be filed publicly?

MR. GRAND: I don't know and that may well be an issue for your Honor to decide this afternoon.

THE COURT: That's what you understand the representation to be?

MR. GRAND: I do.

THE COURT: All right. We'll see. We'll hear in a moment. Go ahead.

MR. GRAND: We believe that under the teaching of Sells and the considerations that are set forth in Sells, [4] all of which are elaborated upon in our papers, the antitrust division should not be permitted to use secret grand jury materials to file a civil lawsuit and that is an issue that we want to litigate before your Honor and that we want to litigate as far as it needs to be litigated to get a resolution.

THE COURT: Does the Sells case cast any light on this issue?

MR. GRAND: The Sells case sheds considerable light, although it specifically left that issue open in footnote 15.

THE COURT: There are other things in that decision besides footnote 15.

MR. GRAND: There are a series of considerations that the Sells case dealt with. One, they dealt with the fact that civil lawyers are only ordinarily seeking to save time by using the grand jury and that in most cases the evidence would otherwise be available through ordinary discovery.

That is I think an important factor and I think is a factor that would readily apply here.

Another factor is that the Supreme Court pointed out that the unfettered access for civil purposes to grand jury materials can lead to the manipulation of the grand jury in ways that are hard to detect.

[5] THE COURT: Mr. Grand, there are all kinds of precautions that perhaps need to be taken and the matter is undoubtedly a delicate matter. I just want to clear the atmosphere of the impression that I think you imply from what you say that what the government did by this ex parte order in November was clearly wrong and forbidden by the federal rules. I don't think that's so.

MR. GRAND: I am not suggesting that their seeking relief from your Honor was wrong. I think I am addressing a different subject. I will come to the ex parte order.

I believe there are two issues that are here today. One has to do with whether the ex parte order that your Honor issued on November 30 should be vacated.

Putting that aside for the moment and dealing instead with another issue that I believe that order did not address because that order as I read it, and as you interlineated between the proposed order, limited the disclosure that the antitrust division was permitted to make to specif[ic] people in the civil division for purposes of consultation only.

THE COURT: I think that's the case. Do you have a copy of my order?

MR. CONRATH: Yes, your Honor.

THE COURT: I have a very distinct recollection of the interlineation that I put in there at the time.

[6] You want to pursue your second point?

MR. GRAND: My second point is that irrespective of this order which, after all, only authorizes the antitrust division to consult on a limited basis with people in the civil division, we contend that under the guidelines of the Sells case prosecutors who present matters to grand juries, at least in our case, cannot go forward and present—use those materials to prepare a civil case and publicly expose those materials, absent an order and a showing of particularized need.

THE COURT: Is that not a little premature?

MR. GRAND: Only in the sense that they have not yet filed a suit and they are going to file it on Friday and it may be moot by Friday.

THE COURT: You are not moving to vacate the order at this time. What you are moving is to prevent the government or the attorneys who represent the government, who participated in the grand jury investigation, from having anything to do with any civil aspects of their proposed proceedings?

MR. GRAND: In the absence of their coming before a court and satisfying Rule 6(e) and making a showing of particularized need to use grand jury materials in a civil case.

THE COURT: Have you read the papers submitted [7] by Miss Swerdel?

MR. GRAND: I have read the papers.

THE COURT: You don't think she made a showing?

MR. GRAND: I don't think she was applying for the relief we are talking about. I don't think she made a showing of particularized need on a couple of scores.

THE COURT: The entire impact of the papers she submitted were to show there was a particularized need. She just didn't say give me these grand jury minutes, I would like to have them. She went through a great deal of trouble to indicate why they were necessary and why that was.

MR. GRAND: I believe what those papers say in a word was that the antitrust division in order to have a uniform policy seeks to consult with the civil division.

There was, as I read it, no comment whatever of any efforts that the civil division had made to seek this discovery that they had gotten in the grand jury by other available means.

THE COURT: Isn't that another issue?

MR. GRAND: I don't think so.

THE COURT: Yes, it is.

MR. GRAND: Part of particularized need is showing that you have to use the grand jury materials for this purpose. That's one aspect. The other aspect is [8] there was no limitation on what they disclosed. They disclosed or they sought permission to disclose the entire contents of what had taken place before the grand jury, a description, as they put it, of the documents and of the evidence and excerpts from both.

I think that on the two traditional grounds that courts look at to determine whether or not particularized need to invade grand jury secrecy has been shown, they failed to make such a showing on either ground.

THE COURT: Miss Swerdel, I think I should hear from you at this point.

MS. SWERDEL: Mr. Conrath will be addressing you today.

MR. CONRATH: Your Honor, this is a case we plan to file on Friday and the the reason we plan to file on Friday is in order to preserve our right to one of the claims that we will be pursuing that would entitle the government to about \$240,000 worth of damages.

The statute we believe will run, if not Friday, very shortly thereafter, Monday or Tuesday and that's the reason we want to file.

What we have here is Mr. Grand is asking for an order prohibiting us from filing our complaint based on facts, most of which they knew several months ago and we think that your Honor ought to deny this motion because, [9] first of all, as you indicate, there was a particularized need in the one disclosure.

There would be an injury to the government if we are unable to file this case on Friday. There's a fully adequate remedy available to Mr. Grand's client which is to litigate any remaining questions of grand jury disclosure in the course of the case before the judge to whom it is assigned in connection with all the other issues.

MR. GRAND: If I may, your Honor, I don't know how I can litigate the grand jury disclosure once it's been spread all over the record.

Secondly, we have offered in the past and I am authorized by my cocounsel, if they are worried about the statute of limitations, we have offered repeatedly in the past to give them a waiver of the statute of limitations in any form they want to enable us to litigate this important Sells issue that the Supreme Court left open.

MR. CONRATH: Your Honor, the particular statute of limitations is jurisdictional under the false claims act, so that we cannot waive it. It cannot be waived.

As I understand it, there are two points to Mr. Grand's argument. One is a collateral attack on the order that your Honor issued, for which we believe that there's particularized need as set forth in the papers.

The other is in essence in Miss Swerdel's head [10] and my head there should be a civil side and criminal side and it is disclosure for us to use knowledge we already have to prepare a civil case and it's our understanding, it's our position, that that's not required.

THE COURT: That seems to me that the trial judge should decide that. I shouldn't. The standing of the attorney to pursue the case is something that traditionally is a matter for the trial judge.

You are going to file the complaint on Friday?

MR. CONRATH: Yes, your Honor.

THE COURT: At that point the case will be assigned to a judge?

MR. CONRATH: Yes.

MS. PARKER: We are not challenging merely the standing of these particular attorneys to try the case. What we are challenging is the fact that these particular attorneys are going to use grand jury material in writing up a complaint and, for example, on the false claims act they have to attach to the complaint the false claims and they are going to use grand jury material for that and so on Friday they will, in essence, publicly file grand jury material without a Rule 6(e) order and it is their position that they need no such order.

What we are here to litigate today is whether in fact they need a Rule 6(e) order under Sells to do what [11] they plan to do and we would like the temporary relief we have requested simply in order for the court to have the time to consider this matter, to consider our papers and whatever papers they submit before they take the action that we feel is prohibited by the supreme court's decision in Sells and I might add by the supreme court's decision in Abbott, in which the Supreme Court said wholesale disclosure of grand jury material is never authorized under Rule 6(e).

THE COURT: I don't think that there is either a persuasive or sufficient showing either to vacate my order or

to stop the government in its tracks in what it's about to do. I think you have adequate and complete remedies before the trial court and they are not, in effect, filing grand jury material.

They are filing the conclusions, the legal conclusions, that they may have drawn for the purpose of pleading a civil case, which is a very different thing from publishing grand jury material. I believe that they have a perfect right to do what they did.

The affidavit submitted to me and the papers in connection with the ex parte motion in November were sufficient justification for everything they did.

In the light of the possible application of the jurisdictional statute of limitations, I don't think it [12] would be fair or appropriate for me to intervene at this time with any kind of restraint.

I would refer you to the trial judge. As soon as the case is assigned you have a right to tell the judge to impound all the papers and to keep the government attorneys out of the case who had anything to do with the grand jury.

All the remedies that you are seeking from me now you can obtain fully and adequately from the trial judge. I see no reason why I should step in because I signed this ex parte order or because of the representations that you make at this time.

MR. GRAND: May we, your Honor, at a minimum, have an order sealing the complaint because my best guess is that it will summarize much that took place in the grand jury and that will at least preserve—it will no way adversely affect their statute of limitations claims and it will give us an opportunity, without having been prejudiced, to litigate the issue.

THE COURT: I can't function on the basis of your guesses. I have seen your guesses work adequately and very effectively in other cases and have respect for them. I can't function on the basis of what you think is going to happen. You'll have to wait for it to happen and assert your right to the remedies at that time.

[13] MS. PARKER: You can ask Miss Swerdel if the complaint will summarize what took place before the grand jury.

MR. CONRATH: The complaint that we file is not going to quote from any transcripts or documents that were made exhibits before the grand jury. It will summarize, as you said, the legal conclusions adequate to plead the case. It is not a disclosure of matters occurring before the grand jury except in the general sense.

MS. PARKER: It has to include facts?

MR. CONRATH: Of course.

MR. GRAND: Those facts are facts developed before the grand jury.

MR. CONRATH: It will in no way indicate which facts were developed before the grand jury and elsewhere.

THE COURT: No pleader worth his salt is going to spill his case in advance. You will have to define or refine all the issues by the usual process of pretrial procedure and then you will be able to find out, without too much trouble, exactly what they are basing their allegations on and whether or not they have made improper use of grand jury material.

But those issues will become available to the trial judge only as a result of the pretrial procedures which are available to you in the first instance.

[14] MR. GRAND: May I respectfully disagree for this reason: When I was talking to your law clerk before we came up he asked the question as to whether or not the grand jury material was used or will be used in the preparation of this complaint. I believe the parties sitting here will stipulate with your Honor that at least 90 percent of the information which is the basis of this complaint will be litigated.

I know they have no other source of information of what they are going to charge is the grand jury. They know it too. They will not say to you that it is necessary to

litigate before a trial judge, to litigate whether or not they using grand jury materials. This entire civil case arrives from the grand jury.

So what we have is a discrete legal issue that we will be prejudiced with respect to litigating because the complaint, which will summarize the grand jury's events — we will be prejudiced from litigating because it will have already been spread on the public record. I think what I am asking is minimal

THE COURT: I don't agree with you, Mr. Grand.

I will ask: Is there any reason why you should make this complaint public at the time you file it? Could you not file it and ask the clerk to maintain it in a separate file until the trial court disposes of the issues [15] that are about to be litigated? I don't want you to make copies of it, for instance, and give it to the press room. That's one thing.

I don't think you should make copies for distribution to anyone except the persons who are directly connected with the case. That way Mr. Grand will have an opportunity to press his objections properly, because if you have made a public disclosure of everything in the complaint and if the complaint does indeed set forth facts which he believes should never have been disclosed, then he will be coming in with his remedy a little bit after the facts which have hurt him and I want to make his remedy effective if he's entitled to it.

So in order to protect him and preserve whatever rights he may have, have you any objection to withholding publicity and such filing as you can withhold until the such time as the trial judge passes on it?

I realize you have to file it in the clerk's office. There are so many steps that you can take to prevent any unnecessary disclosure pending the decision of the trial judge.

MR. CONRATH: We have a problem with actually filing it under seal, your Honor, because of the strong general interest in the openness of court proceedings. I

think we can undertake not to seek publicity by not putting [16] out a press release.

THE COURT: One thing I can ask you: I gave you this permission and stressed the fact that it was being given provided that the information be treated as confidential or its use be limited solely to purposes of this order.

MR. CONRATH: Yes.

THE COURT: Consistent with those special conditions, it seems to me that you could, number one, avoid answering questions that may be posed by the press or anybody else.

Number 2, avoid giving copies of the complaint to anyone except Mr. Grand.

MR. GRAND: And I assume other parties.

THE COURT: You are only one of the parties?

MR. GRAND: Yes.

THE COURT: Mr. Grand and the attorneys for the other parties only, not given to anyone else and not release any press notice of any kind.

That way it seems to me that you are not shutting the door on Mr. Grand's finger so to speak. The door is being left open so he can press his claim under Sells, if he has one, to the trial court.

MR. GRAND: How do we handle the clerk's office to make sure the press people don't come in there?

[17] THE COURT: I'll ask them. When you file the complaint — you know now exactly when you are going to file it?

MS. SWERDEL: As of now, Friday afternoon.

THE COURT: I will give instructions orally myself today to the clerk. Can you send me not later than Thursday a facsimile the caption of the case?

MS. SWERDEL: Yes, your Honor. I can give it to your law secretary.

THE COURT: Give it to him. I will call the clerk, who is in charge of the civil case filings, and I'll give him

specific instructions about filing the complaint and not making it available to persons other than parties until such times as the trial judge has an opportunity to get into it.

That's agreeable to you?

MR. CONRATH: Yes, your Honor.

THE COURT: You have no objection to complying with my request and you will promise to comply with it?

MR. CONRATH: Yes.

MR. GRAND: And the clerk will be so instructed as well?

THE COURT: Yes. I will instruct the clerk today. I have an IRS agent I'm conferring with and as soon as I'm through with him I will definitely call the clerk by [18] 4 o'clock.

MR. GRAND: Your Honor, can we treat your rulings today as a denial of both our order to show cause and our protective order?

THE COURT: Without prejudice to renewal before the trial judge.

Application denied after argument. See record of March 12, 1985. Denial is without prejudice to the renewal of the application before the trial judge.

MR. GRAND: What I am looking for is not only a denial of our application to show cause but for also the ultimate relief sought, the protective order.

THE COURT: Yes. You are asking for two things, to vacate my order and for protection and I am denying both without prejudice.

Actually, it's an application for an order to show cause. I am denying that. We have really gone a little bit into the merits.

MR. GRAND: In case we decide to appeal, I would rather it be as full a denial as in reality it really is.

THE COURT: I'll read this. Tell me whether you see any objection: application for vacat[u]r and protective

relief denied without prejudice to their renewal before the trial judge expected to be assigned when case is filed on March 15, 1985. See record of March 12, 1985. So ordered.

[19] MR. GRAND: Do you think there should be anything in that order about the way the complaint should be treated?

THE COURT: I think you would be guiliding the lily. You could take my word for it. I have put it in the record and my instructions to the clerk are on the record. I think you can rely on that.

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No.

IN RE GRAND JURY INVESTIGATION

STATE OF NEW YORK)

: ss. :

COUNTY OF NEW YORK)

Paul R. Grand, being duly sworn, deposes and says:

1. I am a member of the firm of Grand & Ostrow, attorneys for movants/appellants John Does I and II, and John Doe, Inc. I in the above captioned action and submit this affidavit in support of the instant motion for a protective order and an expedited appeal. The relevant facts are as follows.

RELEVANT FACTS

2. Some months prior to April 1982, the Antitrust Division commenced a grand jury investigation into possible Sherman Act violations in connection with the sale of tallow to Egypt. The theory of the investigation was that Sherman Act jurisdiction existed for sales of drummed tallow to Egypt, even though that commodity is not sold within the United States, because Egypt sometimes used some of the funds appropriated to Egypt by Congress to pay for the commodity.

3. By April 1982, many thousands of documents had been subpoenaed by the Antitrust Division, including from petitioners John Doe, Inc. I, II and III. Thereafter numerous witnesses testified before the grand jury, including petitioners John Does I, II, III, IV and V. Beginning in the summer of 1982 and repeatedly thereafter, at-

torneys for petitioners advised the Antitrust Division that the acts in question were not within the subject matter jurisdiction of the Sherman Act. Nonetheless, the Antitrust Division continued to use the grand jury. On the eve of the expiration of the grand jury, June 8, 1984, the Antitrust Division informed petitioners that the grand jury would not be asked to return any indictments, but that the Antitrust Division was considering initiating a civil lawsuit.

4. On June 28, 1984, the attorney who had been in charge of the grand jury investigation mailed Civil Investigative Demands ("CID") to petitioners herein. The CID's were essentially copies of earlier grand jury subpoenas and were accompanied by a letter advising the recipients that the CID could be complied with by certifying that all documents sought had been produced to the grand jury. In response, petitioners John Doe, Inc., I and II declined to execute such a certificate and advised the Antitrust Division that the use of grand jury materials, including documents produced in response to grand jury subpoenas and grand jury testimony and leads therefrom, to prepare a civil suit would violate Rule 6(e). John Doe, Inc. III executed the certificate specifically preserving its rights under *Sells*. No documents were produced in response to the CIDs and the Antitrust Division made no attempt to enforce the CIDs. Instead, the Antitrust Division simply retained all documents produced to the grand jury even though the grand jury had expired.

5. On March 6, 1985, the Antitrust Division informed appellants that on November 30, 1984, it had obtained, without notice, an *ex parte* order authorizing disclosure of grand jury material to the Civil Division. This order was obtained three months after the Antitrust Division first consulted with the Civil Division, the order improperly authorized wholesale disclosure to the Civil Division, and no showing of particularized need was made.

6. The Antitrust Division further informed appellants on March 12, 1985 that it will file a civil complaint alleging violations of the Sherman Act and federal false claims acts

on March 15, 1985. The theory of the lawsuit apparently will be that price fixing of tallow sold to Egypt injured the foreign policy of the United States and that, because the United States was not explicitly informed of that price fixing, implied false claims were made in violation of the United States' expectation of competitive bidding.

7. Neither the Antitrust Division nor the Civil Division has made any effort to obtain any evidence on which to base this lawsuit, other than from the information obtained by the grand jury. Indeed, the Antitrust Division has conceded that at least 90 percent of the material on which the civil case will be based is grand jury material. Enforcement has not been sought for any Civil Investigative Demands for documents or depositions pursuant to 15 U.S.C. § 1312(a), (b)(2), (i)(1). Instead, the Antitrust Division made a unilateral decision, without authorization from the court, that it was entitled to the wholesale use of grand jury material, which includes many thousands of documents (none of which have been returned to their owners in the nine months since the grand jury expired) and testimony of numerous witnesses, to initiate and litigate a civil lawsuit.

THE NEED FOR A PROTECTIVE ORDER

8. If disclosure is permitted, appellants will, in effect, lose four fundamental rights: (1) their right to have the continuing improper use of grand jury material terminated immediately; (2) their right to have the substance of their own grand jury testimony and the testimony of others which pertains to them kept secret; (3) their right to have attorneys other than those who conducted the grand jury investigation prepare and litigate any civil case; and (4) their right to appeal the district court's ruling below. These rights, once taken away, cannot be restored after the civil

complaint has been filed. At that point, the issue of whether the filing of the complaint violates the appellants' rights becomes moot.

9. The grand jury began subpoenaing documents and hearing testimony three years ago. Having waited this long to bring its complaint, the Government now claims that the statute of limitations will run next week as to *a small fraction* of the claims that it proposes to make in the complaint against appellants. Appellants have agreed to waive the statute of limitations as to those claims pending the resolution of this appeal. The Government responds by arguing that the statute of limitations cannot be waived by appellants because the issue is "jurisdictional."

10. We do not agree that the statute of limitations cannot be waived or that this purported problem cannot be overcome by agreement of the parties. But in addition, it is patently unfair for the Government to wait this long before deciding to file this complaint and then use that delay (of the Government's own making) as an excuse to oppose the appellant's right to litigate fundamental rights which would be lost by the filing of the complaint.

11. The public interest lies in maintaining the status quo in this case because this case raises fundamental issues concerning grand jury secrecy. Absent a stay, this Court will be unable to resolve those issues, as they will have been mooted. The importance of these issues is amply demonstrated by the three recent Supreme Court decisions upholding grand jury secrecy: *Sells*, *Baggot* and *Abbott*.

12. No prior request has been made to this Court for the relief requested by the instant motion.

/s/ PAUL R. GRAND

Paul R. Grand

Sworn to before me this
12th day of March, 1985

/s/ HARRIET LOBE

Notary Public

In the Supreme Court of the United States

No. 85-1613

UNITED STATES, PETITIONER

v.

JOHN DOE INC. I, ET AL.

ORDER ALLOWING CERTIORARI. Filed May 27, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

